

In Re)
) In Bankruptcy
THOMAS R. DORSETT and)
STACEY J. DORSETT,) Case No. 04-71859
)
Debtors.)

The issue before the Court is whether the Debtors may use Sections 1322(c)(2) and 1325(a)(5) of the Bankruptcy Code to modify a contract for the purchase of real estate where the contract expired two years ago and the state court has ordered the Debtors out of possession.

On November 13, 2003, the contract seller, Norman Memmott,

filed a foreclosure action in state court. The Debtors filed an answer on January 6, 2004.

The Debtors filed a Chapter 7 petition in bankruptcy on January 6, 2004. Pursuant to motions by Mr. Memmott which were not objected to by the Debtors or the Chapter 7 Trustee, the Court modified the automatic stay to allow Mr. Memmott to proceed with his foreclosure action and ordered the abandonment of the East Macon Street property on March 3, 2004.

A foreclosure hearing was held in state court on March 11, 2004. The state court found that the Debtors failed to make the required balloon payment of \$21,150 on or after November 4, 2002. The Court further found that the Agreement for Warranty Deed allowed Mr. Memmott to re-enter and retain possession of the property through a foreclosure action. Therefore, the Court entered judgment in favor of Mr. Memmott and placed Mr. Memmott in possession of the property. A foreclosure sale was set for July 6, 2004.

On March 30, 2004, the Debtors filed a Motion to Set Aside Judgment and Motion for Temporary Restraining Order. The state court allowed the temporary restraining order and set a hearing on the Motion to Set Aside Judgment on April 12, 2004.

On April 19, 2004, the state court entered orders denying the Motion to Set Aside and the Motion to Enter a Temporary Restraining Order. The court specifically found that Mr. Memmott was entitled to possession of the property. On April 21, 2004, the state court

entered an Order of Assistance commanding the DeWitt County Sheriff to remove the Debtors from the East Macon Street property.

On April 19, 2004, the Debtors received their Chapter 7 discharge. The Debtors commenced this Chapter 13 proceeding on April 21, 2004.

The Debtors' Chapter 13 Plan proposes to pay Mr. Memmott \$23,777.77 plus 6% interest. The Plan provides for monthly payments of \$685.45 over 60 months to the Chapter 13 Trustee.

Mr. Memmott has filed a Motion for Relief from Stay. The Debtors oppose lifting of the stay.

The determinative issue in this proceeding is whether the Debtors have any legal interest in the East Macon Street property which may be modified in a Chapter 13 proceeding. In other words, can the Debtors reinstate a contract that has expired by its own terms?

In re Brown, 249 B.R. 193, 195-96 (Bankr. N.D. Ill. 2000) sets forth Illinois law regarding real estate installment contracts and the rights of buyers who have defaulted under such contracts:

Illinois real estate installment contracts. Real estate installment contracts - or, as they are sometimes called, installment land contracts or contracts for deed - are much like mortgages: the buyer of the real property takes possession of the property while making periodic payments of the purchase price. However, real estate installment contracts differ from mortgage transactions in two respects: (1) the seller does not issue a deed to the buyer until all of the required payments have been made, and (2) if there is a default in payments, the seller may obtain a forfeiture, which allows the seller both to retain all of the payments made prior to the forfeiture and to have the purchaser removed from the

property, without any foreclosure sale or lengthy judicial process. See Lisa A. Danielson, *Installment Land Contracts: The Illinois Experience and the Difficulties of Incremental Judicial Reform*, 1986 U. Ill. L.Rev. 91, 91-92 (1986). These features have made real estate installment contracts a useful method for financing the purchase of a home in situations where the buyer would not qualify for a conventional mortgage. *Id.* However, the very features that make real estate installment contracts attractive to sellers of property create the potential for results that can be seen as inequitable - a buyer who has paid substantial sums under the contract and defaults in a small amount may be ousted from the property, with no opportunity (under the contract) to cure the default or recover any equity. *Id.* at 92, 96.

Illinois has addressed this potential for unfairness in two ways. First, under the Illinois Mortgage Foreclosure Law, if the buyer under a long-term real estate installment contract has paid a substantial portion of the amount due, the contract is treated as a mortgage, giving the buyer substantial rights of notice, cure, and redemption of equity. See 735 ILCS 5/15-1106(2) (statutory foreclosure required for real estate installment contracts with a term greater than five years, as to which less than 80% of the original purchase price remains due). Second, where the mortgage foreclosure procedure is not required, the seller must comply with the provisions of the Forcible Entry and Detainer Act (FEDA), 735 ILCS 5/9-101 to 5/9-119, in order to effect a forfeiture of the buyer's interests. See Peter A. Hess & Daniel J. Slattery, *Terminating Installment Contracts, in Real Estate Litigation*, at § 13.11 (Illinois Institute for Continuing Legal Education, 1994) (suggesting only forcible entry and detainer proceedings as a means to effect a forfeiture). The forcible entry and detainer provisions include a requirement of at least 30-days' notice to the defaulting buyer, giving an opportunity to cure the default, 735 ILCS 5/9-104.1, and they allow a court entering judgment for the seller to stay the effect of the judgment for up to 60 days, as long as a similar stay was not granted within the preceding five years, again to permit a cure by the buyer, 735 ILCS 5/9-110.

(footnotes omitted).

In this case, the real estate installment contract was for a

term greater than five years, and the Debtors made every monthly payment for five years in addition to making a \$3,000 down payment. Under these circumstances, the contract was treated as a mortgage, and Mr. Memmott commenced mortgage foreclosure proceedings.

Under Illinois law, the statutory right of redemption for real estate is seven months from the date of service or submission or three months from the date of entry of the judgment of foreclosure. 735 ILCS 5/15-1603(b)(1). In this case, the foreclosure judgment was entered on March 11, 2004. Thus, the Debtors' redemption rights expired under Illinois law on June 11, 2004.

A Chapter 13 debtor has redemption rights in addition to those provided by Illinois law. Pursuant to 11 U.S.C. § 1322(c)(1), a Chapter 13 debtor has the right to cure a default at least until the foreclosure sale. The foreclosure sale in this case was set for July 6, 2004.

Accordingly, the Debtors had redemption rights in the real estate under Illinois law and under the Bankruptcy Code when they filed their Chapter 13 petition on April 21, 2004. In re Colon, 319 F.3d 912, 920 (7th Cir. 2003).

As a general rule, Chapter 13 debtors may not modify the rights of holders of claims secured solely by a security interest in real estate that is the debtor's principal residence. 11 U.S.C. § 1322(b)(2). However, 11 U.S.C. § 1322(c)(2) carves out an exception to the rule against the modification of home mortgages: Modification of a home mortgage may occur if the last payment on

the original payment schedule for the mortgage is due before the final payment under the plan is due. This provisions permits the modification of a claim into secured and unsecured components, with the unsecured component crammed down pursuant to 11 U.S.C. § 1325(a)(5). In re Paschen, 296 F.3d 1203 (11th Cir. 2002), *cert. denied* 123 S.Ct. 696 (2002). Case law makes it clear that § 1322(c)(2) applies to balloon payments that mature pre-petition. In re Dasher, 2000 WL 33743082 (Bankr. M.D. Ga); In re Sarkese, 189 B.R. 531, 534-35 (Bankr. M.D. Fla. 1995); In re Chang, 185 B.R. 50, 53 (Bankr. N.D. Ill. 1995); In re Escue, 184 B.R. 287, 292 (Bankr. M.D. Tenn. 1995); In re Jones, 188 B.R. 281, 282 (Bankr. D. Ore. 1995).

Therefore, the Court finds that § 1322(c)(2) allows the Debtors to provide Mr. Memmott with payment of the ballooned real estate installment contract over the life of the plan. Three issues remain to be decided before the Chapter 13 plan is confirmed: (1) Whether the value, as of the effective date of the plan, i.e. the confirmation hearing, of the property to be distributed under the plan on account of such claim is not less than the allowed claim. 11 U.S.C. § 1325(a)(5)(B); (2) Whether the Debtors may extend the payment over a five-year period or whether they must pay it over a lesser three-year period. 11 U.S.C. § 1322(d), and (3) Whether the plan is feasible.

For the foregoing reasons, the Court will set a confirmation hearing on the Chapter 13 plan. The Motion to Lift the Automatic

Stay is denied without prejudice conditioned on the Debtors obtaining confirmation within 60 days and that they make timely payments under their confirmed plan.

This Opinion is to serve as Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure.

See written Order.

ENTERED: September 15, 2004

LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE

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CERTIFICATION OF MAILING

The undersigned, deputy clerk of the United States Bankruptcy Court, hereby certifies that a copy of this Opinion was mailed and/or otherwise transmitted this date to the parties listed herein.

Dated: September 15, 2004

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

In Re)	
)	In Bankruptcy
THOMAS R. DORSETT and)	
STACEY J. DORSETT,)	Case No. 04-71859
)	
Debtors.)	

ORDER

For the reasons set forth in an Opinion entered this day,

IT IS HEREBY ORDERED that Norman Memmott's Motion to Lift the Automatic Stay be and is hereby denied without prejudice provided that the Debtors obtain confirmation of the Chapter 13 plan within 60 days and that they make timely payments under their confirmed plan.

IT IS FURTHER ORDERED that a confirmation hearing be and is hereby set for October 7, 2004, at 9:30 a.m.

ENTERED: September 15, 2004

LARRY LESSEN
UNITED STATES BANKRUPTCY JUDGE

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Dated: September 15, 2004
